

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Orig Affidavit of
Mailing*

77-1417

To be argued by
BARRY E. SCHULMAN

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1417

UNITED STATES OF AMERICA,

Appellee,

—against—

ARNOLD B. MOSKOWITZ,

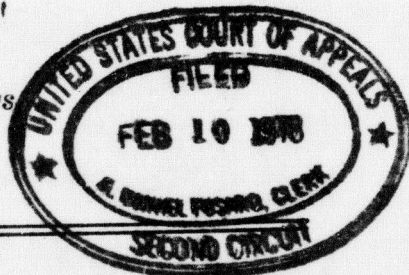
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HARVEY M. STONE,
BARRY E. SCHULMAN,
Assistant United States Attorneys
(Of Counsel).



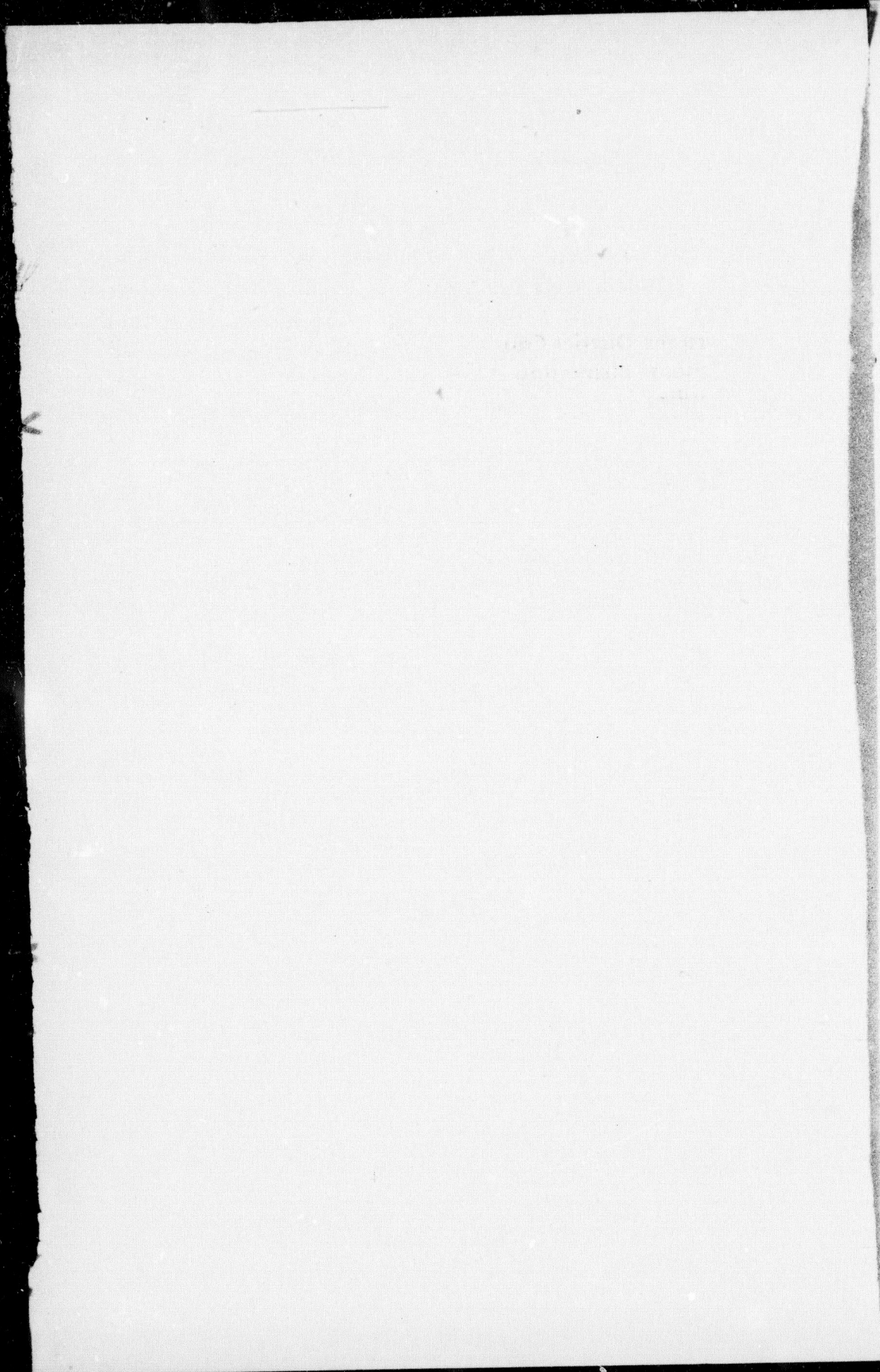


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
 ARGUMENT:	
POINT I—Joyce Pyle's in-court identification testimony was properly admitted	9
A. The hearing	9
B. The identification procedures used were proper	11
C. Any error was harmless	14
POINT II—The composite sketch was properly admitted into evidence	17
CONCLUSION	21

TABLE OF AUTHORITIES

Cases:

<i>Manson v. Brathwaite</i> , 431 U.S. 98 (1977)	13
<i>Simmons v. United States</i> , 390 U.S. 377 (1968)	14
<i>State v. Ginardi</i> , 111 N.J. Super. 435, 268 A.2d 534 (1970), <i>aff'd</i> , 57 N.J. Super. 438, 273 A.2d 353 (1971)	20
<i>United States v. Jarvis</i> , 560 F.2d 494 (2d Cir. 1977)	
	9, 11, 12, 13
<i>United States v. Lewis</i> , 565 F.2d 1248 (2d Cir. 1977)	14

	PAGE
<i>United States v. Marchand</i> , 564 F.2d 983 (2d Cir. 1977)	14, 15, 18, 19
<i>United States v. Russell</i> , 532 F.2d 1063 (6th Cir. 1976)	9, 11
<i>United States v. Zurita</i> , 369 F.2d 474 (7th Cir. 1966)	18n, 11
<i>United States ex rel. Gerald v. Deegan</i> , 292 F. Supp. 968 (S.D.N.Y. 1968)	19
 <i>Other Authorities:</i>	
18 U.S.C. § 3500	18n, 11
Fed. R. Evid. 401, 402	20
Fed. R. Evid. 801(d)(1)(C)	17, 19
N.J. R. Evid. 63(1)	19

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1417

UNITED STATES OF AMERICA,

—against—

ARNOLD B. MOSKOWITZ,

Appellee,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Van Graafeiland, *J.*¹), convicting appellant Arnold B. Moskowitz, following a jury trial, of the armed robbery on June 3, 1976 of the Chemical Bank, 2730 Coney Island Avenue, Brooklyn, New York (Counts One and Two) of two hundred seventy-nine thousand dollars (\$279,000), in violation of Title 18, United States Code, Section 2113(a) and (d).

On September 16, 1977, appellant was sentenced to be committed to the custody of the Attorney General for study and observation pursuant to Title 18, United States

¹ United States Circuit Judge for the Second Circuit, sitting by designation.

Code, Section 5010(e). Execution of sentence was stayed pending appeal.

Appellant does not contest the sufficiency of the evidence, however, he argues that his conviction should be reversed because he contends that Judge Van Graafeiland erroneously failed to suppress the in-court identification of a witness and improperly admitted into evidence a composite sketch of the bank robber.

Statement of Facts

A. The Government's Case

The Government's case consisted primarily of the testimony of three bank employees who had been held hostage by appellant during the course of the robbery, coupled with corroborative evidence.

On June 3, 1976 Michael Gleason, the manager of the Chemical Bank at 2730 Coney Island Avenue in Brooklyn, New York arrived at work at 8:45 in the morning (432).² Gleason parked his car in the bank's rear parking lot near a chain-link fence. As he did so, he noticed a red car without a front license plate parked, facing out approximately two spaces away from him and opposite the rear door to the bank. Gleason stepped from his vehicle into the bright, clear morning and heard someone call his first name. He turned and saw someone, whom he later identified as appellant, calling him from the red car. Appellant then asked, "Don't you recognize me?" Gleason who could clearly see appellant's face, looked carefully and stated that he did not. Appellant said a second time, "Are you sure you don't recognize me?" Gleason said "No", and appellant said, "Take a closer look—you're

² Numerical references are to pages of the trial transcript unless otherwise indicated.

sure you don't recognize me?" By this time Gleason was standing next to the door of the car and was looking closely at appellant. Gleason told appellant that he still did not recognize him and so stated (432-434).³

Appellant then dropped a newspaper to reveal a black .38 caliber revolver pointed at Gleason. Appellant ordered the bank manager to walk in front of the car and sit beside him in the passenger seat; Gleason obeyed (434, 436). Once Gleason was seated, appellant began unfolding his robbery scheme to him, while still pointing the .38 caliber revolver at Gleason's midsection. Appellant told Gleason that he was going to rob the bank and that Gleason should remain calm. Moskowitz then stated that if Gleason did anything wrong, he would have a bomb thrown into his home, and added ominously, "If you think that we don't know where you live, you live at 9 Courtland Drive, Hazlet, New Jersey" (which is, in fact, Michael Gleason's home address) (435). Then, displaying a hand grenade to Gleason, appellant told him that if he did anything wrong, appellant would throw the hand grenade at the bank employees (435). Appellant next displayed a "walkie talkie" that was monitoring police calls. He told Gleason that he knew the police were slow to respond in that precinct (436-437). Appellant had considerable knowledge about police practices, and indeed—though Gleason was then unaware of his background—had received good training for this robbery as a member of the police auxiliary in that very precinct. Moskowitz had been trained to understand the broadcasted police codes and knew how to obtain a device to scan the police bands (665-668).

³ Gleason could little know that he had passed appellant's first test, for appellant, who had been a bank customer, wanted to be sure that he would not be recognized (635-637).

Having thus intimidated Gleason, appellant began to give him specific instructions. Moskowitz stated to Gleason that Gleason's "girl, Joyce" had already opened the vault. Gleason knew that the assistant manager, Joyce Pyle, would normally open the vault in the morning (437-438). Moskowitz explained to Gleason that he and Gleason would enter the bank together, using Gleason's key to the back door. Once inside, Gleason was to order Joyce Pyle to open the main vault compartment where appellant stated he knew that a lot of money was being kept (438, 440). Appellant was quite right because June 3, 1976, was a Thursday, the day the money was to be picked up by an armored carrier. The practice of the bank was to prepare the shipment the night before (439). Gleason told Moskowitz that in order to open the vault compartment he would need another bank employee who knew the second combination to the compartment. Moskowitz ordered Gleason to get Joyce Pyle and anyone else needed to open the vault compartment once they were inside the bank (438).

Appellant then said: "It's 8:55. We are going into the bank now." Moskowitz and Gleason walked to the back door and entered the bank (440). Once inside, appellant concealed himself behind a large panel that was being used to display an art exhibit (441). Appellant had chosen a strategic time to rob the bank since there were six similar panels obstructing the view of the bank floor. Each panel was four feet wide and seven feet tall, and the six panels were placed throughout the bank to display the exhibit. In addition, pieces of sculpture and hanging pictures further obstructed the view of the bank floor to persons inside and outside the bank (452-453). Moreover, at that hour of the morning the tellers would be working behind high counters as they readied themselves for an especially busy day (478).

Gleason called to Joyce Pyle and Frances Criscione, a bank teller. As they approached the bank manager,

they studied appellant's face carefully, since he was a stranger in the bank prior to banking hours (441, 601-602, 684-685). Everywhere in the bank the lighting was excellent (443, 602). Gleason told Pyle and Criscione that appellant had a gun and that appellant's orders should be obeyed. The three bank employees, followed by appellant, then walked quickly into the vault room out of the sight of others and on into the vault itself (442, 454, 602, 685-686). Gleason knelt down and set his part of the combination in the bank's main vault compartment, while Moskowitz stood just four feet from him (442-443).

Then Mrs. Criscione knelt down and began to set her part of the combination. Mrs. Criscione didn't have her reading glasses with her, since she had not expected to open the vault compartment that morning. She turned to Moskowitz (659, 686), who said: "You have 30 seconds to open the vault, you live on Bay Parkway" (443, 604-605, 680-687). Mrs. Criscione managed to set her combination and stepped back. Gleason pulled the door open and Moskowitz ordered the bank manager to give him the bags. Those bags contained two hundred seventy-nine thousand dollars (\$279,000) (444). Moskowitz came forward, pushed past Mrs. Criscione and Joyce Pyle, picked up the bags, and fled (444-445, 466).

At trial Michael Gleason stated that he was "certain" that Moskowitz was the man who robbed him (502-503) and that "there [was] no doubt in [his] mind" that Moskowitz was the robber (589).

Frances Criscione testified that she was certain that appellant was the man who robbed the bank on June 3, 1976 (660). In her testimony Mrs. Criscione noted that appellant bore certain distinctive characteristics when she saw him during the robbery and at the line-up. These

characteristics included a "ruddy brown cheek coloration" and "bow legs" (621-623).⁴

Joyce Pyle testified that she had looked carefully at Moskowitz during the bank robbery (684, 689, 702) and, despite an earlier misidentification (pp. 9-11, *infra*), she was certain that Moskowitz was the bank robber (716).

After completing his robbery, appellant flew to Florida on a National Airlines flight (597, Govt. Exh. 10). Moskowitz had made his reservation for the one-way ticket (598) to Florida the afternoon before the robbery on June 2nd, 1976 at 4:12 P.M. (599, Govt. Exhs. 11 and 12), after he left the Chemical Bank at 2:32 P.M., apparently having "cased" it for one last time (637). Prior to June 3, 1976, appellant had been a bank customer, using the facility approximately four times a month, but after the robbery of June 3, 1976 to the date of his arrest on August 12, 1976 he did not again enter that bank (635-637).

The Defense Case

The defense called Kenneth McGuiness, who testified during his direct examination that he was a bank employee of the Chemical Bank on the day of the robbery (735), that he caught a fleeting glimpse of the robber's face from a distance of 30 feet as the robber rounded a corner into the vault (743-744). He testified that appellant was not the man he saw (745). McGuiness also stated that Mr. Gleason showed him the F.B.I. spread of photographs marked as Govt. Exh. 3 (750-751), when

⁴ The "sunglasses" that Mrs. Criscione was wearing, which appellant refers to in his brief (p. 10), were, in fact, non-prescription graduated lenses with a "10% tint" at the top diminishing to "clear" at the bottom. The glasses in no way obstructed her view. (Defendant's Exh. G, 649-650, 658-659).

no F.B.I. agents were present. However, on cross-examination McGuinness stated that he was not sure who showed him the spread (786). During the Government's case, Michael Gleason testified that he never had been the custodian of these photographs (481).

McGuinness admitted that he did not tell anyone during the lineup that he believed appellant was not the robber, nor notify anyone of that belief after he heard that the appellant had been indicted (760-762). Moreover, McGuinness admitted at trial that he was not certain Moskowitz was not the man he saw on June 3, 1977 (769, 809), and that a composite sketch (see pp. 17-21, *infra*) was a good likeness of the robber and a "dead ringer" for appellant (776-777).

Other defense witnesses included Jack Basso, who testified to the maintenance of walkie talkies at the 61st Precinct (810-816); Elizabeth Doyle, appellant's supervisor, who testified that Moskowitz planned to go to Florida before the robbery (820) and that appellant received regular salary checks during the summer (822-823); Hal Bloomberg, who testified that police scanners could be purchased at Radio Shack, a chainstore (829); Howard Brooks, who testified that Moskowitz wanted to, but did not, work at his gas station the week of the robbery (839), that Moskowitz frequently obtained change for him (841), and that he cashed appellant's payroll checks for him after the robbery, although the gas station was close to the Chemical Bank where appellant could have cashed the checks (845); and Frank Mari, who testified that the appellant hit the "double" and the "triple" at the racetrack prior to the robbery (862).

In addition appellant called the members of his family—his father, Abraham Moskowitz; mother, Marilyn Moskowitz; older sister, Robin Lecoanet; and younger sister, Elaine Moskowitz, all of whom testified that it was their custom and habit to lock the door of the house at night,

that they did not see appellant on the morning of the robbery, and that appellant's luggage did not contain two hundred seventy-nine thousand dollars (\$279,000) prior to his departure for Florida (881-1018).

Appellant also relied on extensive cross-examination of Gleason, Criscione and Pyle, vigorously attacking their identifications of him, especially Pyle's misidentification (pp. 9-17, *infra*).

Finally, Moskowitz himself took the stand (1019). He testified on direct to his background and his activities prior and subsequent to the robbery. He denied robbing the bank (1019-1105). On cross-examination appellant refused to state whether he was bow-legged, stating instead that he "never look[ed]" at his legs (1107). Appellant admitted that he did not make his plane reservations until the afternoon of June 2, 1976, immediately after he left the Chemical Bank (1156). He described his Florida "vacation" as endless driving in a rented car, ever on the move (1115). In an effort to explain that vacation and certain other actions, appellant also told of a tin box that he kept in his bedroom filled with over a thousand dollars in cash (1145-1146). Appellant also testified on direct that he returned to the bank after the robbery. On cross-examination he admitted that he had stated during an interview with a newspaper reporter in February, 1977 that he had never returned to the bank (1170-1171). Appellant further admitted that to re-enter New York City he drove for twenty-four hours in a rented car from Florida to New York, although there was no monetary saving resulting from driving rather than flying (1195-1197). Appellant conceded that, although he had ample opportunity after the robbery to use the Chemical Bank at 2730 Coney Island Avenue to cash his payroll checks, he did not use

the bank and would instead request acquaintances to cash the checks for him (1199-1216).

ARGUMENT

POINT ONE

Joyce Pyle's in-court identification testimony was properly admitted

Appellant maintains that the procedures with respect to Miss Pyle's identification of him as the perpetrator of the crime were impermissibly suggestive, thereby rendering her in-court identification tainted and inadmissible. Specifically, appellant challenges the Government's advising Miss Pyle, some time after she attended a line-up, that she had selected a Federal Bureau of Investigation employee.

Appellant bases his argument on *United States v. Russell*, 532 F.2d 1063 (6th Cir. 1976), and on *dictum* appearing in *United States v. Jarvis*, 560 F.2d 494, 500 (2d Cir. 1977), questioning the propriety of the practice of informing potential witnesses of the correctness of their pre-trial identifications. In our view this Court should uphold Judge Van Graafeiland's findings that the identification procedures followed in this case were not suggestive and that the in-court identification was based on Miss Pyle's independent recollection. Accordingly, Miss Pyle's identification testimony was properly admitted. The government further submits that the error here, if any, was harmless. Before elaborating on these arguments, we turn preliminarily to the relevant facts adduced at the suppression hearing.

A. The hearing

Joyce Pyle testified at a suppression hearing on July 18, 1977 that she was an assistant manager at the bank

(227-228) and had been forced to help appellant open the vault on the day of the robbery (228-232). When Moskowitz first entered the bank with Gleason that morning, Miss Pyle stared long, hard and continuously at him, since he was a stranger in the bank before banking hours (229-24). The lighting in the bank at the time was excellent (229). In the vault Miss Pyle stood to appellant's left. Here, also, the lighting was very good (230-231). Miss Pyle continued to look at appellant throughout the robbery. On one occasion Moskowitz turned toward her and spoke to her in a threatening manner (231). In addition, appellant walked past her several times (231). Joyce Pyle saw Moskowitz for at least 10 minutes during the robbery (245).

At the hearing Joyce Pyle identified appellant in court as being the man who robbed the bank (231). She testified that the day after the robbery she assisted in the creation of a composite sketch (Govt. Exh. 1) and identified it as a true and accurate picture of the robber (232). Approximately one week later she selected a picture of Moskowitz from a spread of photographs as being a picture of the robber (Govt. Exh. 2A-F, 233-234). She testified that approximately a week and one-half later she was unable to identify anyone from a second spread of photographs. On August 12, 1977 she attended a lineup and identified an F.B.I. clerk as the robber (235). Long after the line-up, Miss Pyle was told that she had selected an employee of the F.B.I. (262). Thereafter, during a visit to the Assistant United States Attorney's office, she indicated that viewing conditions at the line-up had been poor, that she had been nervous⁵ and fearful (235, 266), and that she had seen another indi-

⁵ It is to be noted that Michael Gleason also felt viewing conditions at the line-up were insufficient and he asked to step out from behind the door behind which he was concealed so that he might view the line-up directly (85-86).

vidual during the line-up who she thought was the robber (235-236, 265-267). Only then was Miss Pyle shown Government's Exhibits A to F, photos of each of the six individuals in the original line-up with their numbers covered and placed in random order. Joyce Pyle then selected Moskowitz's picture (236). She further testified that in court appellant still bore the same markings about his cheeks as he had on the day of the robbery (239). Joyce Pyle testified that she did not know whom the others had picked (265), that no one ever suggested to her which individual to pick (237), and that her in-court identification at the hearing was based on her own independent recollection (236).

Judge Van Graafeiland found that there was "nothing impermissibly suggestive or unfair about any of the photographic displays or the line-up" ^{shown to} by all three eyewitnesses and "that there was sufficient evidence of independent recollection to support the in-court identification" (397-398).

B. The identification procedures used were proper

The fact that Joyce Pyle was advised that she had selected an F.B.I. employee at the lineup is no reason to reverse appellant's conviction. Appellant misplaces his reliance on *United States v. Russell*, *supra*, 532 F.2d 1063, and *United States v. Jarvis*, *supra*. In *Russell* the Government agent not only informed the witness that she had made an incorrect choice during a photographic identification procedure, but proceeded to draw the witness' attention to a photograph of the man the government suspected of the crime. It was on that basis, *i.e.*, the improper

singling out of a specific picture of the suspect by the agent, that the court reversed the conviction in this case.⁶

The procedures employed in the instant case, however, were not suggestive. Sometime after the line-up Miss Pyle was advised of the identity of the person she had selected. She was not requested to select another person, she was under no pressure to make another identification, and her attention was not drawn to any actual depiction of appellant. Rather, Miss Pyle was shown pictures of the members of the line-up again, because she told the government that there had been another man present in the line-up who she believed was the bank robber. Thereafter, Miss Pyle was shown individual photographs of the members of the line-up. The photographs were cut out so that the numbers and positions of the individuals at the line-up procedure were not revealed. Upon being shown these photographs, Miss Pyle selected appellant's picture.⁷ It is clear then that the facts of this case do not approach those present in *Russell*.

The facts here are also significantly different from those in *United States v. Jarvis, supra*, where this Court, though affirming the defendant's conviction, stated (560 F.2d at 500): "We do not approve the practice apparently employed here by the F.B.I. of informing potential

⁶ In *Russell* the court was careful to point out that the witness saw the robber for only a few seconds from a distance. That was not the case here. Miss Pyle was confined with the robber in close quarters for an extended period of time.

⁷ This information was brought out during the trial, and Miss Pyle was extensively cross-examined with respect to her misidentification (707-717). See p. 15, *infra*.

We note that the close resemblance of the individuals appearing in the line-up is apparent from the photograph appended to this brief. See Appendix B, *infra*.

witnesses of the 'correctness' or 'incorrectness' of their pretrial identifications." We observe initially that *Jarvis* was decided on July 26, 1977, one day prior to the verdict in this trial. Thus, the parties did not have the guidance of *Jarvis* until after Joyce Pyle had made her pretrial identifications and had testified at both the hearing and the trial. In *Jarvis*, moreover, government agents consistently informed witnesses whether or not their pretrial identifications of a bank robber were "correct." One of the two witnesses in that case never identified the defendant from any photospread or line-up, until she was told that her initial selection was wrong.⁸ Significantly, that witness had initially selected another suspect, who was found in possession of a gun taken from a bank guard during the robbery.

Moreover, even suggestive techniques do not bar a witness' testimony *per se*, but must be considered on the basis of the totality of the circumstances to determine whether the in-court identification had an independent basis. *Manson v. Brathwaite*, 431 U.S. 98 (1977); *United States v. Jarvis*, *supra*, 560 F.2d at 500. The factors properly and expressly considered by Judge Van Graafeiland in determining admissibility here were the witness' opportunity to view the perpetrator, the degree of attention he paid, the accuracy of his description, his level of certainty, and the time between the crime and the identification (396). Judge Van Graafeiland found that the identification was the result of independent recollection after a long viewing of the appellant during the robbery and that there had been no improper suggestion in the identification procedures. This Court has held that heavy consideration should be given to a finding by the district court that "the identification was sufficiently certain to be appro-

⁸ Here, of course, at the first identification procedure—a photospread shown a week after the robbery,—Pyle selected appellant as the robber.

priate for submission." *United States v. Marchand*, 564 F.2d 983, 996-97 (2d Cir. 1977).

The circumstances in this case weigh overwhelmingly in favor of admissibility. Miss Pyle had ample opportunity to view the bank robber. She testified that she was in close proximity to the robber for several minutes, during which time she had an opportunity to study his features. She gave a complete, detailed description of the robber—even referring to the "ruddiness" about his cheeks. Her in-court identification was rendered at a high level of certainty. She stated that she was "certain" that the appellant was the man who had robbed the bank and that such identification was the result of an independent recollection (236, 716).

Because the identification in question was made in court at the trial, the time period between the crime and the identification was necessarily substantial. However, it is important to realize that one day after the robbery Miss Pyle gave a description of the robber which resulted in the completion of a detailed composite sketch. Miss Pyle and the other eyewitnesses testified that the sketch was a highly accurate depiction of the robber. Six days after the robbery Miss Pyle selected appellant's picture from a photospread. Cf. *United States v. Lewis*, 565 F.2d 1248 (2d Cir. 1977). It is thus evident that Miss Pyle had a clear independent recollection of Moskowitz at the robbery, and the mere fact that she was advised that she selected an F.B.I. employee at the line-up could not have so tainted her perceptions as to create "a very substantial likelihood of irreparable misidentification". *Simmons v. United States*, 390 U.S. 377, 384 (1968).

C. Any error was harmless

In any event, we submit that any arguable error in the identification procedures used here was harmless.

To begin with, Miss Pyle was extensively cross-examined with respect to her misidentification (707-717). "Protection against identification of questionable certainty is afforded by the requirement that the declarant be available for cross-examination; questions of the probative value of the testimony are thus for the jury." *United States v. Marchand*, 564 F.2d 983, 996 (2nd Cir. 1977). Appellant's counsel spoke extensively of the identification procedures in his opening and closing statements, asking the jury to consider such testimony carefully (424-429, 1296-1309), and even going so far as to tell the jury that he was "persuaded" that the jury would find that the Government would not prove its case. Counsel for appellant referred to Miss Pyle's misidentification in his opening (429) and made clear that her identification was a circumstance that bolstered his own position.⁹

In addition, Judge Van Graafeiland charged the jury extensively and carefully with respect to identification testimony (1348-52). In his charge the judge instructed the jury to "consider the whole history of the identification process in this case in reaching [its] decision, not simply the identifications made by the witnesses in the

⁹ Significantly, appellant launched an extensively prepared defense (including his own testimony), thoroughly attacking the government's identification evidence. Appellant had a well organized and powerful defense camp, consisting of two highly skilled lawyers, an assortment of law students assisting them, a detective, and a sociologist who composed special voir dire questions for the defense and sat at counsel table during the jury selection to assist them. The defense also secured the services of Professor Robert Buckhout to advise them as an expert on eye-witness identification and Judge Van Graafeiland agreed, at appellant's request, to permit Dr. Buckhout to testify as to the suggestive effects of surrounding circumstances on identifications. For tactical reasons appellant decided during his defense case that his interests would not be served by adducing this expert testimony.

courtroom" (1349). The Court specifically noted that the jury should consider with respect to identifications whether "procedures employed by the Government tended to focus attention on the defendant" (1352).

Finally, the identifications of the other two bank witnesses were made after lengthy viewings of Moskowitz during the robbery under optimum conditions. Their lineup and in-court identifications of Moskowitz were made with complete certainty. Miss Pyle was the only Government witness who misidentified the robber at any stage of the proceedings. Therefore, her testimony was probably beneficial to appellant, who had the opportunity to cross-examine her thoroughly, and did so. Indeed, it is fair to say—particularly in light of defense counsel's opening statement and cross-examination—that the defense might well have chosen to call Miss Pyle to the stand had the government failed to do so. The Government's anticipation of this possibility motivated, in part, its decision to call Miss Pyle as a witness for the prosecution.

Moreover, numerous actions taken by appellant during the time immediately before and after the robbery were corroborative of his guilt—from his flight to Florida to his failure, contrary to his prior custom, to return to the bank after the robbery.¹⁰ This inculpatory evidence was reinforced by the robber's professed familiarity with local police practices—knowledge consistent with appellant's training as an auxiliary policeman in the precinct where the bank was located.

¹⁰ After the robbery appellant would request business associates to cash his payroll checks for him although he had ample opportunity to return to the bank, since he frequently did not leave for work until well after banking hours had begun (1204-1205, 1210-1215). On one occasion appellant was surveilled passing near the bank, apparently in a quandry over what to do with his payroll check. Appellant, perhaps sensing that he was followed, quickly took a circuitous route to avoid his pursuers. (1199-1203, 1205-1209).

In short, Miss Pyle's in-court identification testimony was properly admitted in evidence, and the error—if any—was harmless.

POINT II

The composite sketch was properly admitted into evidence.

On June 4, 1976, the day following the bank robbery, a composite drawing was produced by an officer of the New York City Police Department at the direction of eyewitnesses Joyce Pyle and Michael Gleason. (See Appendix A). Following a suppression hearing, Judge Van Graafeiland determined that the composite was admissible under Rule 801(d)(1)(C) of the Federal Rules of Evidence (380-81), which provides, in relevant part:

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) *one of identification of a person made after perceiving him . . .* (Emphasis supplied).

Appellant argues that the sketch was inadmissible, apparently on the ground that it is not a "statement"

within the meaning of Rule 801.¹¹ This contention, however, has been effectively rejected in a recent opinion by this Court upholding the admissibility of a composite drawing and prior photographic-identifications under Rule 801(d)(1)(C). *United States v. Marchand*, 564 F.2d 983 (2d Cir. 1977).

The only distinction between the composite in *Marchand* and that introduced in this case is that the former was drawn by the eyewitness himself, whereas the latter was sketched by a police officer at the direction of two eyewitnesses (and found to be accurate by a third who took no part in its creation).¹² This distinction, however, should not affect the admissibility of the sketch introduced here. Contrary to appellant's assertions, it is clear that Miss Pyle and Mr. Gleason were the creators of the sketch. The police officer was merely the instrumentality through which the witnesses worked. As Judge Van Graafeiland observed at the suppression hearing:

Certainly, in as far as Miss Pyle is concerned and Mr. Gleason, this in fact is their handiwork. Although they didn't do the actual drawing themselves, it was done under their direction, at their suggestion, and both of them testified they were satisfied that when they were through, it was an accurate likeness (380).

¹¹ Appellant bases this argument on the decision in *United States v. Zurita*, 369 F.2d 474 (7th Cir. 1966). That case however, dealt with the meaning of "statement" within the confines of 18 U.S.C. § 3500, which—as the court observed—contains a limited definition of "statement" specifically designed for the purposes of that particular section, and not intended for general applicability. Certainly such a restricted definition of the term "statement" would render Rule 801(d)(1)(C) almost meaningless.

¹² It is noteworthy that the witness/artist in *Marchand* expressed skepticism at the trial as to the accuracy of his drawing. In the instant case, all witnesses testified that the composite was a highly accurate portrayal of the bank robber.

Similarly, a composite sketch has been described as "the embodiment of the witnesses' mental image". *United States ex rel. Gerald v. Deegan*, 292 F. Supp. 968, 974 (S.D.N.Y. 1968) (MacMahon, J.).

In *United States v. Marchand*, *supra* at 996, the Court stated,

"We thus agree that 'Rule 801(d)(1)(C) should * * * be interpreted as allowing evidence of prior identification of the witness of a photograph of the person whom he had initially perceived,' 4 Weinstein 8, Berger, Commentary on Rules of Evidence for the United States Courts & Magistrates 801-107 to 108 (1976), and also to descriptions and sketches."

Both Miss Pyle and Mr. Gleason testified at the hearing and at the trial with respect to the production and the accuracy of the composite, and both were subjected to extensive cross-examination. Therefore, the requirements of Rule 801(d)(1)(C), that the declarant testify and be subject to cross-examination, were met here.¹³

The analysis of the New Jersey Superior Court in upholding the admissibility of a composite sketch under a statutory rule of evidence that provided for the admissibility of pre-trial identification (N.J. Rules of Evidence 63(1)) is quite relevant here. There the court stated:

What has been said with respect to the admissibility of an extra-judicial identification of a photograph is fully applicable to an extra-judicial identification of a composite sketch prepared from a

¹³ Appellant erroneously asserts that the composite sketch was inadmissible since the police artist himself did not testify. Clearly, the critical issue is whether the witness identified the composite as being the robber and not how the composite came into being.

description given by a victim and by him identified, when the composite was completed, as a likeness of the culprit. In each case the eyewitness' statement is that what he sees, be it a photograph or a composite sketch, looks like the offender. Indeed, the procedures used in this case in preparing the composite would appear practically to eliminate the danger present in other extra-judicial identification, whether of persons or photographs, that the person or photograph to be selected was suggested to the eyewitness by others present at the identification.

* * * * *

[A]n identification of a sketch which resembles a defendant is an identification of a party. *State v. Ginardi*, 111 N.J. Super. 435, —, 268 A.2d 534, 544 (1970), *aff'd*, 57 N.J. Super. 438, 273 A.2d 353.

We therefore submit that the composite sketch in question here was properly admissible under Rule 801(d) (1) (C).

Alternatively, the Government contends that the composite was admissible under Rules 401 and 402 of the Federal Rules of Evidence. In the instant case, the composite was relevant evidence which tended to prove a matter sought to be proved. See Advisory Committee's Note to Rule 401, *reprinted in* 1 Weinstein's Evidence 401-3 (1975). The crucial issue in this case was the identity of the bank robber. A most probative item of evidence on this point, with the least chance of error or distortion based on outside influences, was the composite prepared on the day after the robbery.¹⁴

¹⁴ See Wall, *Eyewitness Identification in Criminal Cases*

When a witness describes the perpetrator of a crime to the police, and especially to a police artist who intends to make

[Footnote continued on following page]

In sum, the composite drawing was properly admitted in evidence by Judge Van Graafeiland.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
February 8, 1978

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

HARVEY M. STONE,
BARRY E. SCHULMAN,
*Assistant United States Attorneys,
(Of Counsel).**

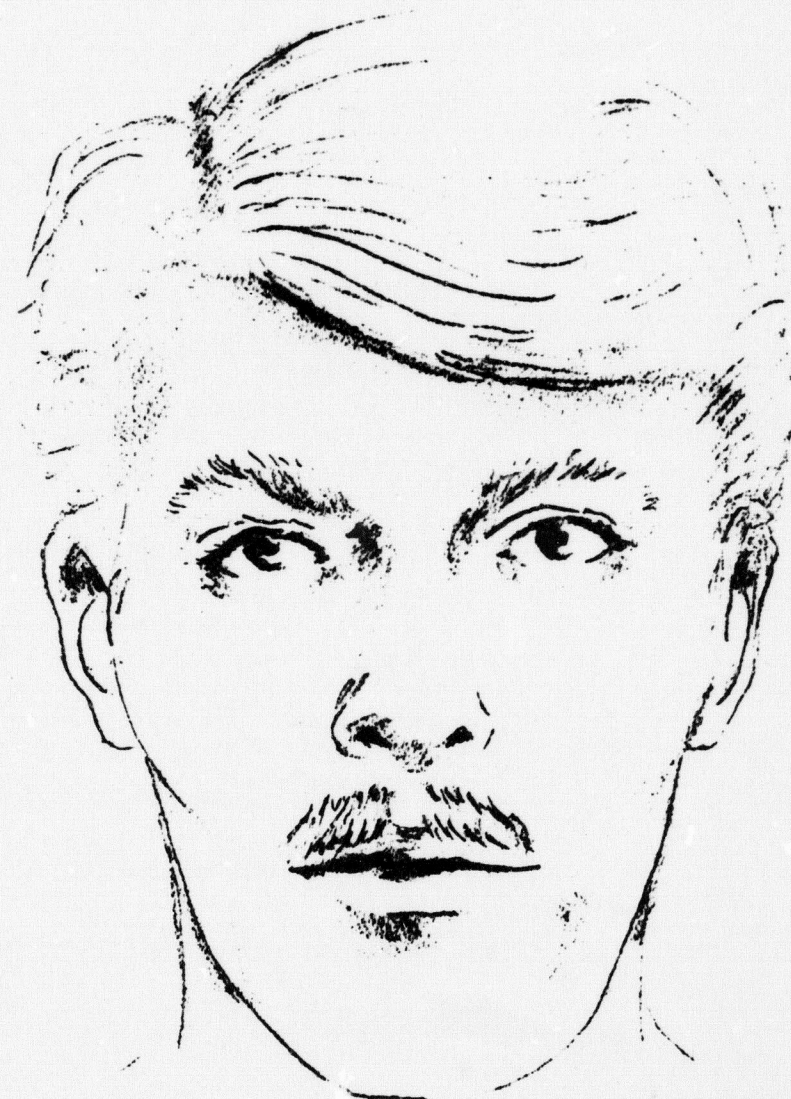
a sketch on the basis of that description, he is subjected to expert questioning of a most rigorous sort. Trained policemen will bring out as many details as any defense counsel could. When a policeman attempts to elicit a description of the criminal, he has the strongest possible motive to elicit a completely accurate one, for it is upon this description that his fellow officers will be forced to rely in seeking the person who committed the crime. At the time the description is obtained, the police almost never have a particular person in mind as a suspect, and there is thus no danger that they will attempt to influence the witness to give a particular description. What they seek is a description of the criminal which is as accurate as possible. The end result is a description which accurately represents, in its oral or pictorial form, the recollection of the witness at a time close to the event. For what it purports to be, it is as trustworthy as it can be. . . .

* The United States Attorney's Office wishes to acknowledge the assistance of Margaret Vaughan, a Third Year Student at Fordham Law School, for her assistance in preparation of this Brief.

APPENDIX

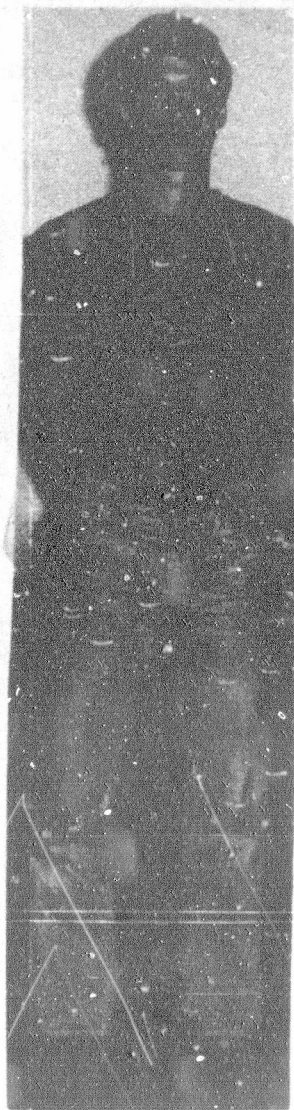
1a

Appendix A



SKETCH No. 232
CASE No. 9456/61
DATE 6-4-78
AM

GOVERNMENT
EXPERT
Id 2
FBI



2a

Appendix B

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barry E. Schulman

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 9th day of February 1978 he served a copy of the within Brief & appendix for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Legal Aid Society, United States Courthouse, 509 Foley Square
New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Barry E. Schulman

Sworn to before me this

9th day of February 1978

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979